No. 15,108

United States Court of Appeals

For the Ninth Circuit

S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green,

Appellants,

vs.

L. A. Martin,

Appellee.

L. A. Martin,

Appellant,

vs.

S. Birch & Sons, a corporation, C. F. Lytle, a corporation, and Green Construction Company, a corporation, partners doing business as Birch, Lytle & Green,

Appellees.

BRIEF FOR APPELLEE IN RESPONSE TO BRIEF OF CROSS-APPELLANT L. A. MARTIN.

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STATEMENT OF PLEADINGS AND JURISDICTION.

For the purpose of this answer to the brief of cross-appellant L. A. Martin, the appellee Birch, Lytle & Green adopts the statement on pleadings and jurisdiction as set out in its opening brief.

STATEMENT OF THE CASE.

The cross-appellee takes no particular exception to the statement of the case in respect to the brief of the cross-appellant and accordingly elects to make no statement of its own. For the purpose of this brief Birch, Lytle & Green will be referred to as the appellee and L. A. Martin will be referred to as the cross-appellant, truly appellant and cross-appellee.

SUMMARY OF ARGUMENT.

The appellee herein is of the opinion that as a practical matter, but a single question is herein presented for the determination of this court on the cross appeal of L. A. Martin, that question being: May a plaintiff who has consented to or accepted the remittitur as ordered by the trial court as a condition to denying a new trial, subsequently challenge the authority of the court with respect to the order to which cross-appellant gave his consent? A possible second question of a related nature is presented: Does a litigant by accepting or consenting to the remittitur, waive any technical objection as to procedure which he might have otherwise had to the order of the trial court?

The appellee herein submits that both questions must be resolved against the cross-appellant.

The appellee has searched the authority presented in the cross-appellant's brief with the exception of the second and third cases listed in the table of authorities cited in the brief of the cross-complaint, which two

cases, so far as the appellee has been able to ascertain, were mis-cited, either through inadvertence of counsel or error in printing. While the cross-appellant has cited some worthy authority, no authority, so far as we have been able to ascertain, has been cited by the cross-appellant that deals directly with the questions above recited.

Let us assume for the sake of argument that the trial court made a procedural error in ruling on a motion, as is contended by the cross-appellant. The cross-appellant not only failed to object to those alleged procedural errors but gave his positive consent (R vol. 1, 08 at page 61) which reads as follows:

> "Comes now the Plaintiff above named, L. A. Martin, by and through his attorneys, Bell, Sanders & Tallman, and consents to a remittitur on the verdict of the jury under compensatory damages in the sum of $2,500.00, in accordance with that certain minute order dated December 30, 1955, on file herein.
>
> Dated this 6th day of January, 1956.
>
> Bell, Sanders & Tallman
> /s/ James K. Tallman,
> Attorneys for Plaintiff.
>
> Service of Copy Acknowledged. (Endorsed) Filed January 6, 1956."

With the above in mind it cannot be denied that the cross-appellant herein did in fact consent to the remittitur ordered by the court and accordingly one would assume that the consent was given without reservation since none is stated.

There is nothing that the appellee can find in the substantial list of cases cited by the cross-appellee which disputes or modifies the respectable authority of Mr. Justice Brewer of the United States Supreme Court in the case of *Lewis v. Wilson,* 151 U.S. 551, which was decided in 1894 on a writ of error issued to the Circuit Court of the United States for the Northern District of Florida involving a verdict and judgment in the plaintiff's favor in the amount of $10,000.00 on which the court ordered a remittitur in the amount of $5000.00, which remittitur was accepted by the plaintiff, who subsequently after the payment of the judgment, moved the court for a judgment on the verdict of the jury, alleging four specifications of error. It is to be noted in that case that no formal consent was filed but there was merely a notation of the clerk that counsel for the plaintiff in open court accepted the remittitur.

Mr. Justice Brewer, in his opinion, stated in part as follows:

> "It is unnecessary to express any opinion as to the right of a party to file a motion for a new trial more than four days after the verdict; nor to decide whether the court can or cannot—in the absence of any motion, of its own volition—whenever it sees that a grievous wrong has been done by a verdict, set it aside. For there is nothing which prevents a party having a verdict from consenting to its reduction; and if he does so, though only for the sake of obtaining immediate satisfaction of his claim and to avoid further delay and further litigation, he may not, after the entry of judgment based thereon, the receipt

of payment, and an acknowledgment of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict. A man may continue litigation and stand on his rights, or he may waive some of his rights for the sake of terminating litigation; and when advised that a new trial will be granted, unless he consents to a reduction of the verdict, he may, although knowing that the court has no power to grant such new trial, and that if it be done an appellate court will correct the error, consent to a reduction and let judgment be entered for the amount of the verdict thus reduced. And if he does so, he is concluded by his action in that respect. Here not only was there a consent on his part to a reduction, but also what amounted to a waiver of errors by the defendants, and a promise to pay the amount of the judgment. There was full consideration for the agreement, and judgment was entered in accordance therewith. Thereafter he received payment and acknowledged full satisfaction. The litigation is at an end by his consent, and he cannot reopen it. There is no force in the contention of the plaintiff that no written consent to the reduction of the verdict, signed by himself or attorney, was filed in the case. None was necessary. A party may in open court consent to such reduction, and the noting of his consent by the clerk in the journal entry of the judgment is sufficient evidence thereof, and cannot be questioned. The judgment will be affirmed."

While it is true that in the case at bar the judgment has not been paid or discharged, it is to be re-

membered that an adequate supersedeas bond has been placed and that accordingly there is tantamount to a payment into court of the amount of the judgment so entered by the court on the consent of the cross-appellant herein. The *Lewis v. Wilson* case finds further parallel since in that case a procedural defect of late filing of motion for new trial was claimed.

There is no showing that the cross-appellant herein excepted to the decision of the court in respect to its order of remittitur and accordingly, following the well-reasoned theory that one who remains silent when duty commands him to speak shall not thereafter be heard to complain because duty remands him to silence. The appeal of L. A. Martin should as a matter of right be dismissed, for not only did the cross-appellant herein remain silent in respect to objection to the court's order of remittitur, but he affirmatively accepted, not by stipulation in open court as in the *Lewis v. Wilson* case, but by actual signed document. (R vol. 1, 08 page 61.)

If in fact the court did make an omnibus order on December 30, 1955 or if the cross-appellant thought the court made an omnibus order, the order of the court could have at that time been challenged, but instead the order of the court was accepted by the cross-appellant, and whereas, there had been no judgment theretofore, the court did, as a result of said consent, enter its judgment. As was so properly observed by Mr. Justice Brewer:

> "A man may continue the litigation and stand on his rights, or he may waive some of his rights for the sake of terminating the litigation; * * *"

The clear conclusion is that he shall not have his cake and eat it at one and the same time.

It is understandable that there should occur a dearth of authority on the particular question herein being considered since it should be conceded that indeed the court rarely should, if ever, allow a litigant to accept and reject in the same breath. That same theory has found voice in the daily affairs of man in expressions that are almost legendary because of their logic and simplicity, such as "you can't carry water on both shoulders", "thou shalt not serve two masters", "don't try to talk out of both sides of your mouth" etc., and accordingly we should expect that case law to support a lesson so well learned would be minimal.

Appellee has, however, found that the decision in the *Lewis v. Wilson* case still enjoys the dignity of its respectable author.

Attention of the court is called to the case of *Deer v. Deer,* decided in the Supreme Court of Washington in 1947, cited at 186 Pac. (2d) 619. An interesting factual situation arose there in the trial of a domestic relations matter before Judge Kinne of the Superior Court of King County. During the course of the trial a recess was called in order that the plaintiff and the defendant might discuss the possibilities of settlement. After an extended conference in the jury room between the parties litigant and their counsel, they came into open court and in a seven page stipulation (apparently dictated into the record) agreed to a property settlement involving

real property, wherein they did not give the legal description to the property to be divided between the parties to the community interest. Nonetheless Judge Kinne, giving full force and effect to the open court stipulation of the parties, entered the decree accordingly. The wife, during the interlocutory decree period, moved to alter the decree and this show cause proceeding was heard before Judge Batchelor of the Superior Court, who after reviewing the facts, refused to modify the decree which was largely based upon the oral open court statement involving the real property. The wife then took an appeal from both the interlocutory decree entered by Judge Kinne and the refusal of Judge Batchelor to modify the decree. The Supreme Court of the State of Washington, in a unanimous decision written by Judge Steinert, affirmed the holding of the lower court and cited with approval, at page 624 of said opinion, the *Lewis v. Wilson* case hereinabove referred to.

The United States Supreme Court decision in the *Lewis v. Wilson* case assisted the court in its decision in *New York Cent. Mut. Fire Ins. Co. v. Diaks,* decided by the Supreme Court of Florida, 1954, 69 So. (2d) 786, which was actually a suit involving three appellant insurance companies against the same respondent. In that particular case a contest arose in respect to payments under a policy of insurance and the counsel for the insurance company at the opening of the trial in the lower court asserted that the policy was in full force and effect and that the only question to be determined was a matter of damages,

and on that theory the case proceeded to trial before the court. While damages were being explored a question of disclosure or non-disclosure of a divided ownership arose and the insurance companies sought to claim a violation of the policy and to disclaim responsibility under the policy by reason of this non-disclosure of a divided ownership which, according to the record there presented, was doubtful but nonetheless was a possible defect in respect to the insurable interest. The trial court held that the parties had come into court to determine the question of damages and had so stipulated and accordingly they were confined to damages. This holding of the trial court was affirmed by a unanimous decision of the Supreme Court of Florida. In that particular case the decision of Judge Brewer as laid out in *Lewis v. Wilson,* 151 U.S. 551, was quoted as compelling authority.

The appellee without waiving its right to make all argument in explanation of or in the distinguishing of the long list of authorities cited by the cross-appellant herein, respectfully submits that this cross-appeal should find its disposition within the framework of Mr. Justice Brewer's opinion above recited.

CONCLUSION.

In view of the authority above recited and the consent filed by the cross-appellant herein, the appellee contends that the further consideration of authority on this segment of the appeal is unwarranted and

that as a matter of right based on authoritative law, the cross-appeal should be dismissed.

Dated, Anchorage, Alaska,
March 11, 1957.

Respectfully submitted,
DAVIS, RENFREW & HUGHES,
By JOHN C. HUGHES,
Attorneys for Appellees.